CASE NO.: I 2674/2011

IN THE HIGH COURT OF NAMIBIA

In the matter between:

MB DE KLERK & ASSOCIATES **PLAINTIFF**

and

HARRY MARZELL EGGERSCHWILER **FIRST DEFENDANT**

MWANGI CHEREBA VRAHAM WA KAMAU **SECOND DEFENDANT**

CORAM: KAUTA, AJ

HEARD ON: 19TH JUNE 2012

DELIVERED ON: 27TH JULY 2012

JUDGEMENT

KAUTA, AJ: [1] This is an action for provisional sentence based on an acknowledgement of debt for N$132 587.47. The Defendants oppose the

granting of provisional sentence because, firstly the acknowledgement of debt is subject and conditional to other agreements which the Plaintiff did not honour. Secondly, because the true indebtedness rests against a third party namely, African Civil Aviation Agency (Pty) Ltd. Thirdly, because the acknowledgement of debt was signed as a result of undue pressure by an agent of Plaintiff. And lastly, the debt embodied in the acknowledgement of debt relates to a future debt.

[2] In response to the Defendants' contentions Mr Strydom on behalf of the Plaintiff contends firstly, that the Defendants consented to the acknowledgment of debt to be made an order of court or for the Plaintiff to apply for default judgment for any amount outstanding after the 24th of May 2011, and that this consent preclude the Defendants to raise any defense. Secondly, that the debt does not relate to future fees because of the cession of N$500 000.00 signed in respect of that. Thirdly, the acknowledgement of debt is clear and unequivocal in its terms. Lastly, the Defendants failed to prove undue influence.

[3] The Defendants take no issue with the fact that they signed the acknowledgment of debt. The full court in *Sperrijn & Stolp v Van Oudtshoorn*, 1906 T.S. 88, held that, "where an acknowledgement of debt was ambiguous as to whether a debt was in existence or merely anticipated ('in consideration to the sale of my farm Langerverwacht No. 100, district Ermelo, I hereby acknowledge to be indebted to you in the sum of £150')", it was not a liquid document. The reasons for so holding are not explicitly stated, but obvious.

[4] As a general statement the principles and practice followed by the Cape Courts were enunciated by Kotzé, J.P., in *Pepler v Hirschberg*, 1920 CPD 438, in these terms on page 443:

"*Where the acknowledgment of indebtedness is sufficiently clear and certain, and payment depends on some simple condition or event, it is sufficient for the*

Plaintiff to allege that the condition has been complied with or the event has happened, and then the onus lies on the Defendant to show that what was intended by the document sued on to be a condition precedent to entitle the Plaintiff to succeed, has not been complied with. If the Defendant is unsuccessful in establishing that, then provisional sentence will be granted against him. In the case before me the Defendant acknowledged to have received the £500, and undertook to repay the same to the Plaintiff within a reasonable time, if the bond were not passed. The summons sets out that the bond was not passed, and the Defendant has not denied or controverted that…I, therefore, think that the claim for provisional sentence must be granted against the Defendant with costs".

[5] A brief history of this matter is instructive. It is common cause that the Defendants are the Chief Operating Officer and Chief Executive Officer of the African Civil Aviation Agency (Pty) Ltd respectively. On the 24th of May 2011 the Defendants on behalf of African Civil Aviation Agency (Pty) Ltd ceded all the rights, title and interest up to the maximum amount of N$500 000.00 in the claim of N$22 million of African Civil Aviation Agency (Pty) Ltd against the Government of Republic of Namibia to the Plaintiff. The Plaintiff, a firm of legal practitioners, was the instructed legal practitioners of record of African Civil Aviation Agency (Pty) Ltd in their claim against the Government. This cession was in force and in effect from date of signature until final payment of indebtedness. The final payment of indebtedness was deliberately left open by the parties perhaps because it depended on the outcome of the impending trial. The acknowledgment of debt in this matter was similarly signed and concluded on the 24th of May 2011, the same day the cession was signed.

[6] The similarity of the dates of signature gives credence to the Defendants' contention that the acknowledgment of debt was subject to other agreements and undertakings. The other agreements the Defendants referred to must be the cession. The Defendants are representing themselves in this matter. Upon

reading the acknowledgment of debt it is clear that it does not reveal the cause of indebtedness. The Defendants alleged that the true indebtedness were future legal fees for an anticipated trial between African Civil Aviation Agency (Pty) Ltd and the Government. The Plaintiff resists the Defendants' contention primarily because the Defendants in the acknowledgment of debt renounced among others, the legal exceptions *non causa debiti*. In answer to this the Defendants contend that they are layman and these legal principles were not explained by the Plaintiff's agent to them and in the alternative they were compelled to sign the agreement.

[7] The onus rest on the Defendants to prove on the preponderance of probability that they are not liable for the debt once they acknowledge having signed the acknowledgment of debt.

See *Inglestone v Pereira* 1939 WLD 55 at 71

[8] I turn now to deal briefly with the undertakings which the Defendants allege were part and parcel of the acknowledgment of debt. In my view the undertaking is grounded in the letter of the Plaintiff to African Civil Aviation Agency (Pty) Ltd dated the 5th of July 2011. This letter was addressed for the Defendants attention. The letter is firstly, a reminder to African Civil Aviation Agency (Pty) Ltd about their overdue account. Secondly, it reminds that there are no funds on trust to proceed with the scheduled trial. The last paragraph in the letter was written with a dual purpose; firstly, it's an advice that the trial should be postponed; secondly, it's a veil warning that the Plaintiff will withdraw as legal practitioners of record for African Civil Aviation Agency (Pty) Ltd, if there's no consent to the advice for postponement. I say a veil warning due to the timing of this letter. The consent was sought for a trial which was a mere six days away. It is common cause that the Defendants rejected the advice given and consequently the Plaintiff withdrew as legal practitioners of record of African Civil Aviation Agency (Pty) Ltd.

[9] The date of the letter is further important for two reasons. Firstly, it gives credence in my view to the Defendants' assertion that any debt owed to the Plaintiff as at 5th July 2012, was not owed by the Defendants personally. Secondly, the letter despite it having been addressed for the Defendants' attention makes no reference to debts owed by the Defendants personally. This in my view explains and gives further credibility to the Defendants' assertion that the acknowledgement of debt was part and parcel of a group of other agreement and undertakings. The inference is irresistible on a preponderance of probabilities that the Defendants were asked to sign the acknowledgment of debt in their personal capacities as security for the due fulfillment of the obligations arising out of the cession between African Civil Aviation Agency (Pty) Ltd and Plaintiff. This in my view explains why the cause of indebtedness is conspicuous by its absence in the acknowledgment of debt and the certainty of the amount there must be as fees due to the Plaintiff at 24th May 2011 by African Civil Aviation Agency (Pty) Ltd. In this context, the acknowledgement of debt between the parties is no different from a suretyship agreement.

[10] It is trite law that a suretyship contract is accessory to a main contract; as such it is conditional upon the existence of a principal obligation. As Nienaber JA put it *'guaranteeing a non-existent debt is as pointless as multiplying by nought'*. See: *Kilroe-Daley v Barklays National Bank Ltd* 1984 (4) SA 609 (A) at 622I; CFForsyth & *Pretorius Caney's Law of Suretyship in South Africa 6ed* (2010) 30; *African Life Property Holdings (Pty) Ltd* 1995 (5) 230 (A) at 238F. The cession being the principal obligation in this matter is *ex facie* not due and payable because the undertaking therein is that the Plaintiff will receive payment upon the completion of the claim contemplated therein by the parties. In view of what I say in paragraph 9 above I conclude that the Defendants have discharged the onus and established the necessary preponderance of probability in their favour that the agreement is subject to further undertakings and the cession.

[11] In the result I make the following order:

1. Provisional sentence is refused.

KAUTA AJ

COUNSEL ON BEHALF OF THE PLAINTIFF: **ADV STRYDOM**

INSTRUCTED BY: **MB DE KLERK & ASSOCIATES**

ON BEHALF OF THE DEFENDANTS: **IN PERSON**